Supreme Court, U.S.
FILED
JUN 12 1992
OFFICE OF THE CLERK

(2)

No. 91-1829

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

EDWARD D. JONES & CO., L.P.,

Petitioner,

v.

STEVEN W. and LINDA K. CARTER,
WILBUR E. and CAROL FRUSHOUR,
LARRY E. and NORMA B. LEWELLEN,
FLOYD C. and NORMA J. SICKLER,
and EUGENE W. and DONNA L. SMITH,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA, THIRD DISTRICT

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June 12, 1992

Washington, D.C. • THIEL PRESS • (202) 328-3286

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STATEMENT OF THE CASE

Respondent's counsel received Petition for Writ of Certiorari to the Court of Appeals of Indiana, Third District, on May 13, 1992. Accordingly, this brief is due by June 12, 1992.

Petitioner Edward D. Jones & Co.'s (hereafter "Jones") Statement of the Case is argumentative. Apart from that,

it omits several matters pertinent to consideration of its petition for writ of certiorari.

The instant action arose out of allegations that Jones sold Petro-Lewis oil and gas limited partnerships in violation of the Indiana Securities Act and the Indiana Racketeer Influenced and Corrupt Organization Act. The complaint also asserted that Jones committed fraud and constructive fraud in the sale of those securities.

The action was commenced by 68 individual plaintiffs. However, with regard to 11 of those plaintiffs, Jones filed a motion to compel arbitration. That motion was based on Full Service Account Agreements signed by those 11 plaintiffs substantially after their Petro-Lewis investments. The trial court entered its order compelling arbitration, which was followed by an appeal by the 11 affected plaintiffs, heretofore and hereafter referred to as the "Account Agreement Plaintiffs." [1]

The arbitration clause in question consisted of a few lines in the middle of a two page, small-print Account Agreement. (R. 38-49) Although Jones quotes a typical arbitration clause in footnote 2 of its petition, it conveniently fails to note that portion of the Account Agreements which governed the matters to which the entire agreement applied. Specifically, the Account Agreements stated that:

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[1] Footnote 1 on page 2 of Jones' Petition for Writ of Certiorari to the Court of Appeals of Indiana, Third District, refers to the fact that a number of the original plaintiffs were not parties on appeal and leaves the impression that the non-appealing plaintiffs accepted the court's arbitration order. In fact, the non-appealing plaintiffs were unaffected by the arbitration order inasmuch as they did not sign Account Agreements. Their actions continued, and on July 16, 1991, a judgment was entered in their favor and against Jones for approximately $2.8 million which included $1.75 million in punitive damages.

"This agreement . . . shall cover . . . all accounts which the undersigned may open or reopen with you . . ."

(R. 39, 41, 43, 45, 47, 49)

As already mentioned, Jones committed the acts complained of in the complaint, resulting in the Account Agreement Plaintiffs' purchases of Petro-Lewis, substantially before the signing of the Account Agreements containing the arbitration clause. Specifically, four of the Account Agreement Plaintiffs had purchased the security approximately 6 years or more before they signed the Account Agreement; two purchased the security about 4½ years before signing the agreement; two signed the agreement roughly 3½ years after their purchases; and the remaining two signed more than 1½ years after they had completed their purchases. (R. 3-15, 38-49) Jones made no attempt to show that the accounts through which the Petro-Lewis securities were purchased were opened or reopened after the execution of the Account Agreements.

ARGUMENT

I.

JONES FAILS TO PRESENT ANY QUESTION WARRANTING THIS COURT'S EXERCISE OF JUDICIAL DISCRETION PURSUANT TO SUPREME COURT RULE 10.1

Rule 14.1(a) of the Rules of the Supreme Court require a petition for writ of certiorari to state the questions presented for review. That rule also limits the Court's exercise of its discretionary review to the precise questions stated in the petition for writ of certiorari by providing that "[o]nly the questions set forth in the petition, or fairly included therein, will be considered by the Court."

Jones' Petition for Writ of Certiorari to the Court of Appeals of Indiana, Third District lists three questions presented to this Court. The first two questions as stated by Jones relate to the discussion by the Court of Appeals of Indiana of Mo.Rev.Stat. §435.460 and its effect on the arbitration clause as contained in the various Account Agreements. The third question as stated by Jones relates to what Jones claims was the Indiana court's adoption of a rule that ambiguities in an arbitration clause should be construed against the draftsman.

As discussed below, none of the questions presented by Jones creates a special and important reason for granting a writ of certiorari.

A. The Indiana Court of Appeals' Discussion of Mo.Rev.Stat. §435.460 is Merely *Obiter Dictum* Without Precedential Value.

Jones' petition devotes significant attention to the discussion by the Court of Appeals of Indiana regarding Mo.Rev.Stat. §435.460. Jones posits that the Indiana court violated the supremacy clause by applying a state statute precluding arbitration in violation of the federal policy favoring arbitration.

In reality, the Indiana court's discussion of Mo.Rev.Stat. §435.460 had virtually no impact on that court's holding. Although that court concluded that the arbitration provision in question violated Mo.Rev.Stat. §435.460, the court's holding is not based on that violation. Rather, the Indiana court based its decision on the well-recognized principle that arbitration should not be required where no agreement to arbitrate exists; here the Account Agreements did not cover the transactions at issue. In short, the court's discussion of the Missouri

statute was wholly unnecessary to its ultimate decision. Accordingly, the court's discussion of the Missouri statute is merely *obiter dictum.*

It is well settled in Indiana that *obiter dictum* has no value as precedent. In *Koske v. Townsend Engineering Co.*, 551 N.E.2d 437 (Ind. 1990), the Supreme Court of Indiana recently noted that:

> "In appellate opinions, statements not necessary in the determination of the issues presented are *obiter dictum.* They are not binding and do not become the law."

Id. at 443.

Thus, Jones seeks a writ of certiorari based, in large part, on a discussion which had no binding impact anywhere – not even in the State of Indiana. Regardless of how the Supreme Court might answer Questions 1 and 2 presented by Jones' petition, those answers can hardly be construed as raising special and important reasons for the writ sought inasmuch as the lower court's holding was not as Jones presupposes in the first two Questions Presented.

In view of the many cases which have discussed *Volt Information Sciences, Inc. v. Board of Trustees,* 489 U.S. 468, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989), and its effect on state statutes relating to arbitration of disputes, it may be necessary for this Court some day to discuss the scope of *Volt.* However, a case which was not decided on the basis of the state statute under attack hardly presents the opportune occasion for such analysis.[2]

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[2]The Account Agreement Plaintiffs disagree with Jones' interpretation of *Volt* and its progeny. Jones' argument fails to consider the result in *Volt,* which is inextricably pertinent to its

[footnote continued]

B. The Indiana Court Did Not Hold that Ambiguous Arbitration Clauses Should be Construed Against the Drafter.

Paragraph 3 of the Questions Presented and the related argument of Jones presumes that the Court of Appeals of Indiana held that an ambiguous arbitration clause should be construed against the draftsman. Jones then concludes that the Indiana court's opinion in that regard contravenes ruling precedents of this Court.

The main problem with Jones' argument in this regard is that Jones attributes to the Indiana court a holding not made by that court. In reality, the language regarding ambiguities, which Jones attempts to attribute to the Indiana court, is instead included within that court's discussion of *Frates v. Edward D. Jones & Co.*, 760 P.2d 748 (Mont. 1988). In discussing *Frates*, the Indiana court noted that, among other things, the *Frates* court stated that ambiguities should be construed against the drafter. However, the Indiana court clearly did not adopt or even approve of that particular language in *Frates*. Instead that court held that:

> "We agree with the Supreme Court of Montana's conclusion in *Frates* that the *clear language of the agreement requires prospective application of the arbitration clauses.*"

571 N.E.2d at 1334 (Emphasis supplied).

In interpreting contract provisions, the courts consider the rule regarding construction of documents against the drafter only where the contract is ambiguous; where the

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holding. However, further analysis of *Volt's* impact on the application of state statutory provisions in an arbitration setting is inappropriate here since the holding of the Indiana court was not based on the application of the Missouri statute.

clear language of the agreement shows the intent of the parties, there is no reason to resort to the rule regarding construction of ambiguous documents against the drafter. *See, e.g., Cincinnati Insurance Co. v. Mallon,* 409 N.E.2d 1100 (Ind.App. 1980). Thus, by holding that the "clear language" of the agreements refuted Jones' claim for arbitration, the Indiana court had no occasion to decide what happens in the event of an ambiguity in an arbitration agreement. Jones' mischaracterization of the opinion of the Court of Appeals in this regard is an obvious attempt to question the court's opinion based on federal cases which, in reality, are inapplicable. Even the federal cases cited by Jones do not require arbitration where "the clear language of the agreement" shows that the parties did not agree to arbitrate the dispute at hand.

Jones' argument in this regard is accordingly based on a false premise, *i.e.* that the Indiana court declared a rule of law which it did not in fact so declare. Inasmuch as the third question presented by Jones can warrant the granting of the writ sought only by ignoring the actual holding of the lower court, that question cannot form the basis for a finding of a special and important reason for the granting of the writ.

II.

JONES MISSES THE POINT OF THE INDIANA COURT'S HOLDING.

In its zeal to obtain a writ of certiorari, Jones either intentionally or unwittingly misses the rationale behind the holding of the Indiana court. Throughout its petition, Jones contends that the Court of Appeals of Indiana "rejected" federal authorities by refusing to order arbitration. Jones' argument results from a disregard of, or confusion over, the federal scheme creating a dichotomy

between the standards applicable to construction of arbitration clauses generally and the construction of specific contract language pursuant to those federal standards. Contrary to Jones' argument, the Indiana court did not "reject" any federal authority.

While the federal authorities are uniform in announcing a healthy regard for arbitration, no case requires arbitration in every situation. The Federal Arbitration Act declares, and the federal authorities are consistent in holding, that arbitration will only be ordered when an agreement to arbitrate the particular dispute at hand exists. 9 U.S.C. §2; *Volt, supra.* While federal authorities direct that contracts be interpreted with a preference for arbitration, the very basic fact remains that someone must apply some rules of contract construction in order to make the threshold determination of whether or not the agreement at hand meets the federal standard, *i.e.* whether it is reasonably susceptible of an interpretation favoring arbitration.

A fundamental question is, "What rules of contract construction should be applied in making the threshold determination?" *Volt, supra,* clearly answers this question by declaring that state law rules regarding contract construction should be applied. *Id.* at 474, 109 S.Ct. at 1253. Even the dissent in *Volt* agreed that "the interpretation of contracts is a matter of state law." *Id.* at 482, 109 S.Ct. at 1257. Thus, the threshold determination of whether or not the agreement is reasonably susceptible of an interpretation favoring arbitration is made in accordance with state rules of contract construction. Accordingly, the Indiana court was warranted in looking "to Missouri law in our *construction of the contracts.*" 571 N.E.2d at 1333 (Emphasis supplied).

In the instant case, there is absolutely nothing to indicate that, in the application of state rules of contract construction, the lower court failed to apply the federal standard by giving a healthy preference to arbitration. In effect, the Indiana court applied state rules of contract construction and concluded that the language of the subject contract was not reasonably susceptible of an interpretation calling for arbitration of the subject dispute. As stated in *Volt*, "this Court does not sit to review" such state court conclusions. *Id.* at 474, 109 S.Ct. at 1253.

Despite Jones' protestations to the contrary, the Indiana opinion does not contravene any ruling of this Court or conflict with any other federal authority but is instead consistent therewith.

III.

THE INDIANA COURT WAS JUSTIFIED IN FINDING THAT THE SUBJECT AGREEMENTS WERE NOT REASONABLY SUSCEPTIBLE OF AN INTERPRETATION COMPELLING ARBITRATION.[3]

Although it is questionable whether this Court should ever become involved in an individual case of arbitration contract construction where there is no indication that the lower court violated principles favoring arbitration (*Volt, supra* at 474, 109 S.Ct. at 1253.), a review of the contract language involved in this case shows that the

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[3]The interpretation of the specific language at issue in this case is not fairly included in Jones' questions presented for review. However, Jones argues in its brief that the specific language of the Account Agreement should be construed to apply retroactively. While this Court can disregard an issue mentioned only in the argument, the Account Agreement Plaintiffs nonetheless respond to Jones' argument regarding the specific language involved in the event the court considers that language.

Indiana court was warranted in construing that language and concluding that "the clear language of the agreement requires prospective application of the arbitration clauses." 571 N.E.2d at 1334.

A complete reading of the Account Agreements illustrates that the parties did not intend the agreements, including the arbitration clause, to apply to the previous purchases of the Petro-Lewis securities. The Account Agreements stated that the arbitration clause applied to controversies arising out of or relating to accounts. The agreement then effectively defines "accounts" as used throughout the agreement, including the arbitration clause, by stating that the coverage of the agreement extends to all accounts which the customer "may open or reopen;" the definition of "accounts" makes no mention of accounts that are already opened (except to the extent those accounts may in the future be reopened) or of previously opened accounts which may have been closed at the time of the execution of the Account Agreements.

Giving the words of the Account Agreements their usual and common meaning, the only reasonable explanation of that language is that the Account Agreements were executed to cover, prospectively, accounts opened or reopened in the future. Therefore, the Indiana court correctly reasoned that compelling arbitration of the Petro-Lewis purchases completed several years before execution of the Account Agreements resulted in the Account Agreement Plaintiffs being required to arbitrate claims which they had not agreed to arbitrate.

In an effort to avoid the language specifying prospective application of the Account Agreements (*i.e.* to accounts opened or reopened after the execution of the agreements), Jones ignores that language and instead

argues that the "controversy" arose after the signing of the Account Agreements. In essence, Jones seeks to rewrite the agreements so as to require arbitration of "disputes" arising after the execution of the Account Agreements despite the fact that the Account Agreements expressly limit their application to accounts opened or reopened after their execution; the applicability of the Account Agreements is not in any way governed by the date a dispute arises.

Further, this entire argument by Jones ignores the procedural background of this case, further illustrating the flaws in Jones' argument. Procedurally, the instant action was not the first filed against Jones as a result of its conduct in the sale of Petro-Lewis securities. On March 8, 1985, an initial action was filed on the same matter, and that action sought class action certification to include all Petro-Lewis purchasers including the Account Agreement Plaintiffs. (R. 10) It was only after class action certification was denied on May 5, 1988, that the Account Agreement Plaintiffs ceased to be part of the putative class, and this action followed. (R. 10) Eight of the Account Agreement Plaintiffs signed their agreements after the filing of the first lawsuit on March 8, 1985, while they were still members of the putative class. (R. 38-49) Therefore, by Jones' own definition the "controversy" or "dispute" in the instant matter arose before the execution of the Account Agreements, and the arbitration clause was inapplicable thereto.

Finally, in an effort to avoid the clear impact of the language used in the agreement as drafted, Jones cites several federal court cases where the particular contract language called for arbitration of past transactions. Jones calls the contract language in those cases virtually identical to the contract language in the instant case. However,

an analysis of those authorities shows that they are distinguishable and that the reason arbitration may have been proper there but not here is due to very significant differences in the particular contract language at issue.

In *Belke v. Merrill Lynch, Pierce, Fenner & Smith,* 693 F.2d 1023 (11th Cir. 1982), the court was faced with an arbitration clause which required arbitration of "any controversy between us arising out of *your business or this agreement*" [*Id.* at 1025, footnote 4 (Emphasis supplied)], without any language of prospective application as was involved in the instant case. Arbitration language applying to "your business or this agreement," without language of prospective application, is clearly susceptible of an interpretation that it applies to past transactions. However, the clear distinction between the broad language in *Belke* and the considerably narrower language involved here is further indication of why arbitration should not have been required in the instant case.

In *Rand Bond of North America, Inc. v. Saul Stone & Co.*, 726 F.Supp. 684 (N.D. Ill. 1989), the court was not dealing with the retroactive application of an arbitration agreement – at least not in the same sense as in the instant case. In *Rand Bond* the parties entered into a commodities trading arrangement. Although the first order was placed on April 27, 1987, the documentation establishing the arrangement was not signed until May 4, 1987. However, it was apparent that the documents of agreement signed May 4 governed the entire relationship of the parties commencing April 27. Further, the Arbitration Agreement, which was one of the documents signed May 4, expressly applied to "[a]ny controversy or claim arising out of or relating to your accounts" (*Id.* at 689) without any limitation whatsoever as to the accounts or transactions governed by the agreement. The instant

Account Agreements contained such a time limitation inasmuch as they expressly applied only to accounts thereafter opened or reopened.

The remaining cases relied upon by Jones contain arbitration clauses which are significantly broader than in the instant cases. Those clauses contain no limitation on the accounts to which they apply, support retrospective application, and are otherwise qualitatively distinguishable from the language in the instant case. *Gilmore v. Shearson/American Express, Inc.*, 668 F.Supp. 314, (S.D.N.Y. 1987) [arbitration applying to "[a]ny controversy *arising out of or relating to the account* of the undersigned, *to transactions with you* for the undersigned *or to this agreement*" (Emphasis supplied)]; *Clark v. Kidder, Peabody & Co.*, 636 F.Supp. 195 (S.D.N.Y. 1986) [arbitration prescribed for disputes "arising out of or relating to *accounts* of *or transactions* with or for me or to this agreement" (Emphasis supplied) without language of prospective application].[4]

Here, there was a significant break between the completion of the purchases out of which this action arose and the date of execution of the Account Agreements containing the arbitration clause. The least amount of time which elapsed between those dates was one and a half years with the greatest time elapsed being nearly seven years. The average elapsed time between completion of the fraudulent sale of the Petro-Lewis security

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[4]In fact, in *Clark v. Kidder, Peabody*, the court's opinion implies that arbitration for past transactions would not have been ordered had the agreement containing the arbitration clause resulted in the opening of a new account, such as was apparently the situation in the instant case, rather than the restructuring of an existing account. 636 F.Supp. at 197.

and the execution of the Account Agreements was in excess of four years.

Jones has not cited, and is clearly unable to cite, any authority where a contract or arbitration provision was held retroactively applicable to a transaction completed more than four years (much less to transactions completed nearly seven years) before the agreement was signed, especially where the pertinent language is prospective, rather than retroactive, in nature. In fact, the only two appellate tribunals to consider the precise language in the instant Account Agreements, namely the Montana Supreme Court in *Frates, supra,* and the Court of Appeals of Indiana in the instant case, have construed the language contrary to Jones' position.

CONCLUSION

Jones has failed to present any question warranting the grant of the writ sought. Also, Jones has failed to show any precedent established by the Court of Appeals of Indiana which contravenes any holding of this Court. Further, Jones has not established that the Indiana court did anything other than construe the agreements at issue under the standard of a healthy preference for arbitration. Instead, Jones seeks to involve this Court in virtually every case of interpretation of specific contract language and would have this Court hold that arbitration is required virtually anytime the word "arbitration" is used even though the clear intent of the parties, as expressed in their agreement, shows that arbitration was not intended for the dispute at hand.

In view of the foregoing, the Account Agreement Plaintiffs respectfully request that Jones' petition for writ of certiorari be denied.

Respectfully submitted,

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